St. Mary's Home, Inc. t/a St. Mary's Infant Home *and* Professional and Health Care Division, Local 233, United Food and Commercial Workers International Union, AFL-CIO. Case 5-CA-12535

April 21, 1981

DECISION AND ORDER

Upon a charge filed on August 20, 1980, by Professional and Health Care Division, Local 233, United Food and Commercial Workers International Union, AFL-CIO, herein called the Union, and duly served on St. Mary's Home, Inc. t/a St. Mary's Infant Home, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 5, issued a complaint and notice of hearing on September 19, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 20, 1980, following a Board election in Case 5-RC-11096, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about May 24, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 26, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 20, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 23, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response in opposition to the Motion for Summary Judgment.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response in opposition to the Motion for Summary Judgment, Respondent denies or refuses to admit or deny, *inter alia*, that it is an employer engaged "in commerce" or "affecting commerce" as defined in Section 2(6) and (7) of the Act, or that the Union is a labor organization within the meaning of Section 2(5) of the Act. Respondent denies that it has unlawfully refused to bargain with the Union, contending that the union certified by the Regional Director is different from the labor organization named on the petition and the election ballot, and asserts further that the Board did not properly consider the matters raised by Respondent in its election objections and requests for review filed in Case 5-RC-11096.

The General Counsel contends in his Motion for Summary Judgment that, with respect to Respondent's contentions regarding the Board's consideration of its election objections, Respondent's denials and assertions raise no factual issues or issues which were not addressed in the underlying representation proceeding, and that Respondent is attempting to relitigate herein issues already decided. With respect to Respondent's contention that the certified union is a different union from that which filed the charge herein, the General Counsel contends that Respondent has produced no evidence in support of its assertion.

A review of the record herein, including that of the representation proceeding in Case 5-RC-11096, establishes that on January 21, 1980, Professional and Health Care Division, Retail Store Employees Local 233, AFL-CIO, filed petitions in Case 5-RC-11095 and 5-RC-11096 seeking certification as the representative of certain employees of Respondent. The Regional Director for Region 5 conducted a hearing on February 6, 8, and 11, 1980. On February 8, 1980, the Regional Director approved the withdrawal of the petition in Case 5-RC-11095. On March 6, 1980, the Regional Director issued a Decision and Direction of Election in Case 5-RC-11096, which listed the petitioning union as "Professional and Health Care Division of Retail Store Employees Union, Local 233, AFL-CIO, as chartered by United Food and Commercial Workers International Union, AFL-CIO." By telegram dated March 28, 1980, the Board denied Respondent's timely request for review, except that it amended the Decision and Direction of Election to

[1] Official notice is taken of the record in the representation proceeding, Case 5-RC-11096, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

permit Respondent's medical records clerk to vote under challenge. On April 2, 1980, a secret-ballot election was conducted by the Regional Office in which the Union received a majority of the votes cast.[2] Thereafter, Respondent timely filed objections to the election. On May 20, 1980, the Regional Director for Region 5 issued a Supplemental Decision and Certification of Representative. On July 9, 1980, the Board denied Respondent's timely request for review of that supplemental decision.

By letter dated May 22, July 11, and August 7, 1980, the Union made written demands for bargaining with Respondent. Each of these letters bears the letterhead of Retail Store Employees Union, Local 233, Chartered by the United Food and Commercial Workers International Union, AFL-CIO, and is signed by "Jack Taylor, Sr., President." By letter dated August 13, John M. Ryan, Respondent's counsel, declined to recognize and bargain with the Union, and stated, *inter alia*:

> You wrote me on August 7 as President of the Commercial Workers Union Local 233. As you know the Commercial Workers Union Local 233 has nothing to do with St. Mary's Infant Home. The name on the ballot in the election held at St. Marys was RETAIL STORE EMPLOYEES UNION LOCAL 233.
>
> If the name, status or affiliation of your union has changed you should notify the employees at St. Marys, obtain their consent and ask the Board to amend your certification. I would like to know if there has been any change.
>
> In the meantime, as I advised Mr. Pato, the Board of St. Marys is considering its alternatives and in that regard has been in contact with the Fifth Region. I believe a decision will be forthcoming and you will be promptly advised.

In its response in opposition to the Motion for Summary Judgment, Respondent contends that the Union herein is not the same union which petitioned for certification, nor is it the same union whose name appeared on the election ballot or which the Board certified. Respondent states that it received a letter from Taylor, the Union's president, which claimed that the organization filing the petition was identical to the labor organization certified, and that the name change resulted from the merger of two international unions. Respondent argues that, notwithstanding the Union's unsubstantiated explanation for the change in its name, it is not obligated to bargain with the Union until it is properly certified through an amendment of certification proceeding or a new election. In addition, Respondent reasserts its contentions made during the representation proceeding that the Board erred in asserting jurisdiction over Respondent because it does not affect commerce and because it functions as a religious educational and health care institution exempt from coverage of the Act pursuant to the Supreme Court's decision in *N.L.R.B.* v. *The Catholic Bishop of Chicago*.[3] Finally, Respondent reaffirms its allegation made in the representation proceeding that the Union's organizing effort was tainted by supervisory participation.

We find no merit in Respondent's contentions. With regard to Respondent's contention that it is not obligated to bargain with the Union because the Union is not the same labor organization that petitioned for certification, we note that in *Warehouse Groceries Management, Inc.*,[4] the Board found that United Food and Commercial Workers International Union, AFL-CIO, is a continuation of and successor to the representational rights of Retail Clerks International Association and Amalgamated Meat Cutters and Butcher Workmen of North America, which two unions merged on June 6, 1979, inasmuch as "the local bargaining representatives of the Retail Clerks continue to perform as local representatives of the [United] Food and Commercial Workers, and day-to-day operations have remained as they were before the merger."[5] Moreover, we note that Respondent made no mention of the alleged change in the Union's identity in its requests for review of the Regional Director's Decision and Direction of Election or his Supplemental Decision and Certification of Representative. We find, therefore, that Respondent did not refuse to bargain out of any real concern over the merger, since it raised no objection when it first became aware of the Union's name change. Accordingly, we find that Respondent's assertions with respect to the Union's name change do not raise any issues warranting denial of the Motion for Summary Judgment.

As for Respondent's remaining contentions in opposition to the Motion for Summary Judgment, it is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled

[2] The tally of ballots furnished to the parties showed that 46 employees cast valid ballots for, and 39 cast valid ballots against, the Union. There were four challenged ballots, an insufficient number to affect the results of the election.

[3] 440 U.S. 490 (1979).

[4] 254 NLRB 252 (1981).

[5] *Id.* at 256.

to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent St. Mary's Home, Inc. t/a St. Mary's Infant Home, a Virginia corporation, is a health care institution engaged in the operation of a medical and residential care facility in Norfolk, Virginia. During the 12 months preceding issuance of the complaint, which is representative of all times material herein, Respondent derived gross revenues from the operation of its facility in excess of $250,000 and, during the same 12-month period, purchased and received products in excess of $50,000 from companies who in turn purchased the said products from points located outside of the Commonwealth of Virginia.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Professional and Health Care Division, Local 233, United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All regular full-time and regular part-time nurses' aides, housekeeping employees, laundry employees, maintenance employees, food service employees, sewing employees and classroom aides employed by Respondent at its Norfolk, Virginia, facility: excluding all other employees, office and clerical employees, medical records clerks, professional and technical employees, guards and supervisors as defined in the Act.

2. The certification

On April 2, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 5, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 20, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about May 22, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about May 24, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since May 24, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

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[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. St. Mary's Home, Inc. t/a St. Mary's Infant Home, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Professional and Health Care Division, Local 233, United Food and Commercial Workers International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All regular full-time and regular part-time nurses' aides, housekeeping employees, laundry employees, maintenance employees, food service employees, sewing employees and classroom aides employed by Respondent at its Norfolk, Virginia, facility: excluding all other employees, office and clerical employees, medical records clerks, professional and technical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 20, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about May 24, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, St. Mary's Home, Inc. t/a St. Mary's Infant Home, Norfolk, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Professional and Health Care Division, Local 233, United Food and Commercial Workers International Union, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All regular full-time and regular part-time nurses' aides, housekeeping employees, laundry employees, maintenance employees, food service employees, sewing employees and classroom aides employed by Respondent at its Norfolk, Virginia, facility: excluding all other employees, office and clerical employees, medical records clerks, professional and technical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Norfolk, Virginia, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Professional and Health Care Division, Local 233, United Food and Commercial Workers International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All regular full-time and regular part-time nurses' aides, housekeeping employees, laundry employees, maintenance employees, food service employees, sewing employees and classroom aides employed by the Employer at its Norfolk, Virginia, facility: excluding all other employees, office and clerical employees, medical records clerks, professional and technical employees, guards and supervisors as defined in the Act.

ST. MARY'S HOME, INC. T/A ST. MARY'S INFANT HOME